CENTER FOR JUSTICE

COMMUNITY BUILDING
35 WEST MAIN AVENUE
SUITE 300
SPOKANE, WA 99201
TELEPHONE: 509.835.5211
FAX: 509.835.3867

ATTORNEYS & ADVOCATES

JIM SHEEHAN
Founder
BREEAN BEGGS
Chief Catalyst

BONNE BEAVERS
RICK EICHSTAEDT
ANDREA POPLAWSKI
JOHN SKLUT
TERRI SLOYER

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Karen Dinicola
Washington Department of Ecology,
Water Quality Program
P.O. Box 47696
Olympia Washington 98504

SENT VIA EMAIL (kdin461@ecy.wa.gov)

RE: Comments on Phase II Eastern Washington Draft Permit

Dear Ms. Dinicola:

Thank you for the opportunity to comment on Ecology's Phase II Eastern Washington Draft Permit. These comments are submitted on behalf of the Sierra Club, Upper Columbia Group (Sierra Club). Sierra Club has dedicated significant time and resources to working to protect the water of the Spokane-Coeur d'Alene Basin, including participation in the development of the TMDL for the Spokane River. The development of this permit is an important step toward improving the water quality of the Spokane River and its tributaries. Accordingly, we would like to continue work closely with Ecology toward the finalization of this permit.

General Comments:

Permit Coverage/Additional Permittees

Sierra Club strongly supports Ecology's decision to include additional municipalities, Ellensburg, Moses Lake, Pullman, Sunnyside, Walla Walla, into the scope of coverage by this permit. Inclusion of these municipalities ensures that this program will have even greater water quality benefits to Eastern Washington.

Sierra Club does request that the actual permit contain specific reference to the petition process referenced on the bottom of page 18 of the draft Fact Sheet (*citing* 40 C.F.R. § 122.26(f)) to add jurisdictions due to "significant contribution of pollutants to state

waters." In addition, the criteria used for consideration of such a petition should be included in the actual permit language. Sierra Club suggests that the permit include language such as:

> Any person may petition the Department of Ecology to evaluate a municipal separate storm sewer for the need to obtain permit coverage. The petition shall contain relevant information to assist the Department in this evaluation. In response to a petition, the Department may perform an evaluation of the municipal separate storm sewer system for which the petition is received. If the evaluation indicates that a municipal separate storm sewer contributes to a violation of water quality standard or if the sewer system is in a rapidly developing watershed, Ecology shall require that the sewer system obtain coverage under this program.

Watershed Based Approach

As with the preliminary draft, the final draft permit fails to consider or adopt any element of watershed planning or consideration of specific land use issues. This is the time to adopt a holistic watershed approach. Sierra Club recommends that Ecology consider the adoption of a permit scheme based upon Michigan's watershed-based stormwater discharge permit program.[1] Under this program, extensive watershed planning among municipal dischargers occurs to ensure that the problem of stormwater is adequately addressed on a holistic basis in a watershed by identifying and implementing actions needed to resolve water quality/quantity issues. The permit requires the development of the watershed plan within 2 years of its issuance and must identify specific water quality problems, long/short term goals, and specific actions to reach these goals. Such an approach is very appropriate for a watershed such as the Spokane River, which is a rapidly growing urban area, contains a number of large municipal stormwater systems, and is water quality impaired for a number of stormwater related pollutants (DO and PCBs). We strongly encourage Ecology not to miss the opportunity to address these issues on a watershed basis.

Incentives for Low Impact Development and Water Conservation

This permit should contain conditions to create incentives for Low Impact Development[2] and implementation of outdoor conservation measures that limit runoff of irrigation water into stormwater systems. Obviously, the best way to avoid water quality impacts is by developing construction and water practices that proactively seek to avoid causing a water quality violation.

Individual Permits

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[1] A copy of this permit is available at www.crwc.org/programs/phase2pdfs/watershedpermit.pdf.
[2] *See* http://cfpub2.epa.gov/npdes/stormwater/menuofbmps/edu_7.cfm for a discussion of these measures and the benefits to water quality.

As with the preliminary draft, it is unclear under what circumstances, if any, the application of the general permit is not appropriate and when an individual permit would be required. Are there any circumstances under which a general permit would not be appropriate based upon the condition of the receiving water? Further, it is unclear how, if at all, the application of this permit would be altered based upon watershed conditions. How does the listing of receiving waters as impaired or waters of concern impact the application of this permit? How does permit implementation consider use designations and current condition of the receiving water, high quality waters (ONRWs), and the presence of threatened and endangered species? The permit further fails to address anti-degradation requirements of the Clean Water Act.

TMDL Compliance and Implementation

Ecology asserts that no TMDLs have more specific requirements than those found in this draft permit. However, a critical question needs to reviewed: did Ecology consider specifically consider stormwater as a point source when completing the TMDL? As indicated on page 38 of the Fact Sheet, most of the TMDLs considered stormwater a subset of nonpoint discharges. Given this, Ecology should reconsider and reevaluate stormwater related impacted in §303(d) listed streams, assess stormwater contributions, and design specific measures to address those impacts.

Ecology's current approach to TMDLs fails to recognize stormwater systems are point source discharges and that it is unlikely that compliance with the permit will constitute compliance with the federal regulations addressing impairments, TMDL development, and NPDES permit adjustments.

New Sources/Dischargers

The permit must contain provisions to specifically address new sources/discharges, particularly in the event that a receiving water is listed as impaired or as a water of concern on the State's §303(d) list.

The Clean Water Act specifically requires that new sources do not cause or contribute to water quality violations or are consistent with TMDLs. Section 122.4(i) provides in relevant part:

> No permit may be issued: ... [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by [Section 301(b)] of [the] CWA, and for which the State or interstate agency has performed a pollutants load allocation for

> the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i).

Two basic propositions may be derived from the regulation. One is that a new source or discharger cannot discharge if it will contribute to the violation of water-quality standards. The other is that, when a new discharge is proposed and a TMDL has been established, the proponent must demonstrate that the discharge complies with the TMDL. The permit should be modified to reflect this.

Timing

The specific timing for many minimum performance measures is simply too far into the future (near the end of the permit term), especially if the municipalities have been developing and implementing at least part of a program since 2003. How do these minimum expectations relate to what the municipalities have already been doing and have been expected to do? These timelines should be tightened up to ensure the maximum benefit of the permit program to water quality.

Federal Facilities

Federal facilities should not be exempted from the Phase II permit program. It is unclear from the draft permit why this exemption exists. Ecology has delegated authority in the State of Washington to administer the NPDES program. Under Section 313 of the Clean Water Act, 33 U.S.C. § 1313, federal facilities must meet state water quality standards to the same extent of any other entity. Accordingly, Ecology should remove this exemption and extend coverage of the Phase II permit program to federal facilities.

Cross Border Responsibilities

The draft permit is silent as to how cross-boundary (Idaho and Oregon) stormwater impacts will be addressed. Will EPA address these issues? What is the mechanism to protect Washington's waters from upstream cross-boundary impacts?

EPA Review/ Endangered Species Act Consultation

It is unclear from the material provided from Ecology on this draft permit what type of review will occur by EPA to ensure that the permit complies with the requirements of the Clean Water Act. Further, it is unclear whether §7 consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service will occur to evaluate potential impacts associated with the issuance of this permit. Sierra Club strongly supports close consultation and coordination with these agencies to ensure that the permit is legally sound and protective of aquatic resources.

Specific Comments/Questions:

Condition S1: As stated above, Ecology should incorporate a section discussing the petition process for inclusion into coverage by this permit.

Condition S1.C.1.a: See comment above. Federal facilities should not be exempt from permitting requirements.

Condition S1.C.2: How does Ecology define "contributing substantially to the pollutant loading" in this section? How does Ecology identify whether a small MS4 is a "cause of impairment"?

Condition S1.D.2.a.i: The City of Spokane should not be included in the Phase II permit program. The population of Spokane is more than 195,000. Given that the population exceeds 100,000, it appears that Spokane shall be required to be covered under the Phase I program.

Condition S1.D.2.c.i: The Town of Millwood and City of Liberty Lake are subject to coverage by this permit and have not applied. Ecology should take appropriate action to ensure that these entities properly apply for an NPDES permit.

Condition S4: This condition (S4.B) states that the permit "does not authorize" violations of water quality standards, ground water quality standards, sediment standards, or human health criteria in the National Toxics Rule criteria. However, this is not a meaningful or enforceable permit condition and leaves wide room for interpretation. This is particularly the case when reviewing Condition S4.E that merely sets the goal of "mak[ing] progress towards compliance" with water quality standards. It appears that despite the statement in Condition S4.B that this permit will allow discharges that will violate water quality standards.

RCW 90.48.520 sets a standard for permits: "In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria." State NPDES and general permit regulations require permits, "whenever applicable," to include "limitations or requirements" necessary to "meet water quality standards." WAC 173-226-070(3) (a); WAC 173-220-130(1) (b) (i). RCW 90.48.520 admits of no exception and makes compliance with water quality standards "applicable" to these general permits. WAC

173-201A-040(1), -070(1), and -160(3) all also require compliance with water quality standards.

The permit condition should state, "The permit prohibits any discharge that causes or contributes to a violation of water quality standards."

Further, it is unclear what, if anything occurs if there is a violation of water quality standards. The permit must clearly require an action to address water quality violations. Sierra Club suggests, at a minimum, the permit contain language to require the imposition of additional BMPs to address the violation. The State of California has adopted permits that contain process for implementing additional BMPs to address violations that may serve as a model for Ecology in this effort.[3]

Condition S4.C: This condition calls for a reduction of discharge to the "maximum extent practicable." This standard shall be tightened to prohibit discharges that cause or contribute to water quality standard violations.

Condition S5: The permit must provide for review and approval by Ecology of the Stormwater Management Programs developed by each municipality. *See Environmental Defense Center v. EPA*, 344 F.3d. 832, 856 (9th Cir. 2003).

Condition S5.A.1: This condition must be revised to require that the SWMP be designed to ensure compliance with water quality standards and to ensure that stormwater systems do not cause or contribute to any water quality violation. The current language will do little to ensure that water quality standards in the State are achieved.

Condition S5.A.2: The timeframe for the completion of the SWMP is simply too long (4.5 years after issuance of the permit). Completion of the SWMP must occur on a much more aggressive timeframe.

Conditions S5.B.1&2: Public outreach and participation should be required in all aspects of permit implementation. This should include providing the public with specific information about proposed authorized discharges, including providing information on the status of receiving waters (§303(d) status, ESA-issues, etc.). Public input opportunities must be provided. The permit should be modified to specifically require the distribution of information and requirements for public participation during site-specific implementation of the permit.

Conditions S5.B.3.a.i&ii: It is unclear why the completion of a map and field verification of the outfall locations will take the entire permit term. This timeframe should be tightened to be completed no later than year 3.

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[3] *See* http://www.swrcb.ca.gov/rwqcb4/html/programs/stormwater/la_ms4_final/FinalPermit.pdf (Part 2, §3 describes this process).

Condition S5.B.3.a.iii: Permittees shall be required to provide mapping information to the public, in addition to Ecology.

Condition S5.B.3.c: The timeframe for the completion of the plan for non-stormwater detection is simply too long and should be completed within the first 2 years of the permit.

Condition S5.B.3.d: The timelines for distribution of information and establishment of a "hotline" are simply too long. These are relatively easy tasks that should be established within 1 year of the permit term.

Conditions S5.B.4&5: These conditions must require the development of a program to meet water quality standards and avoid actions that cause or contribute to violations, not merely "reduce pollutants." As a new source/discharge, construction sites are one area were it is relatively easy (and legally required) to ensure that measures are taken to prevent an action that causes or contributes to a water quality violation (see discussion of new sources above).

Further, Sierra Club objects to the limitation that new stormwater discharge requirements are limited to projects that result in a disturbance of one-acre or more. Both AKART and MEP standards require consideration of sites under one-acre, particularly when such new sources would threaten to cause or contribute to a violation of water quality standards. This is of particular concern where a new source may discharge into an impaired waterbody. Ecology should expand the scope of the application of new stormwater discharge requirements to included smaller sites.

Lastly, the permit must provide for review and approval by Ecology of the Construction Stormwater Management Programs developed by each municipality. *See Environmental Defense Center v. EPA*, 344 F.3d. 832, 856 (9th Cir. 2003).

Condition S5.B.6: The timelines provided for in this section are simply too long and should be reduced to be implemented within the first two years of permit issuance.

Further, good housekeeping measures should include outdoor water conservation measures, including limiting lawn irrigation, that can runoff into stormwater systems and the incorporation of low impact development measures for new and redeveloped municipal facilities.

Condition S6: The permit must provide for review and approval by Ecology of the Stormwater Management Programs developed by each municipality. *See Environmental Defense Center v. EPA*, 344 F.3d. 832, 856 (9th Cir. 2003).

Further, this condition must require the development of a program to meet water quality standards and avoid actions that cause or contribute to violations, not merely "reduce pollutants."

Lastly, as stated above, the timelines for the implementation of the measures under this condition are simply too long and must be tightened up. For example, condition S6.C.3.c provides 4.5 years to complete a map of the stormwater system.

Condition S7: See discussion of TMDL in general comments above.

The permit fails to require compliance with specific waste load allocations found in TMDLs and provides that Ecology "may" incorporate other TMDL requirements through permit modification or reissuance. This should be rewritten to state, "shall."

Once a TMDL allocates a load for a pollutant to various sources, those allocations must be made to the permit at its reissuance, if not sooner. Accordingly, the permit should contain a "reopener clause" to allow site-specific amendment of a permit to incorporate load allocations set forth in the TMDL.

Condition S8: Sierra Club strongly objects to the lack of water quality monitoring requirements in the first permit period. Further, the draft permit leaves the development of a monitoring program exclusively to the Permittees with no specific minimum requirements that must be developed. An initial framework for monitoring should be developed for implementation during the first permit period, including the implementation of a sampling plan that includes wet weather sampling of key points within a watershed (including tributaries) and at locations where stormwater enters the river.

Further, it is unacceptable that the development of a BMP effectiveness monitoring program in delayed until four years in the program. A BMP effectiveness monitoring program with an adaptive management component should be included in the final permit. Sierra Club suggests that the permit be revised to: (1) require a minimum level of water quality monitoring of receiving waters to better assess the impacts of stormwater discharges; (2) require more extensive monitoring where discharges occur into water quality impaired (§303(d)) waters; and (3) require the development and implementation of a BMP effectiveness monitoring program (including Ecology review and approval) within the first two years of permit implementation.

Condition S9: There are two subsections B of this condition, which is confusing.

This condition should require distribution of the annual report to any member of the public specifically requesting a copy.

Condition G3: While Sierra Club supports this condition, it appears to be more stringent then the illicit discharge requirements that have rather slack timeframes for identification and addressing illicit discharges. The illicit discharge requirements should be tightened to more closely mirror this section.

Condition G6: As stated above, this permit does not appear to specifically require measures to reverse violations of water quality standards. Does this section purport to require a Permittee to take action to avoid water quality standard violations (adversely affecting human health or the environment)?

Condition G12.D: How does Ecology define "contributes significantly to water quality standards violations"?

Conditions G14 & 15: These conditions should include language that authorizes revocation, modification, and requires reporting for, "a violation of any term or condition of this general permit."

Appendix 1: Sierra Club strongly objects to the exemptions for the Spokane River from controls on direct discharge of metals on page 11. The Spokane River is listed as impaired for a number of pollutants and fish advisories throughout the river exist due to high levels of metals migrating from the Coeur d'Alene Basin Superfund site. Countless Ecology documents point to the problem with metals in the Spokane River. For example, a document titled, Metals Concentrations in Spokane River Sediments Collected with USGS in 1998, states, "Metals results were consistent with historical data in showing elevated to extremely high concentrations of zinc, lead, and cadmium in sediment samples from most parts of the river."[4] Likewise, an analysis of samples from 1997 indicated that "all zinc and lead concentrations in the Spokane River, from above the stateline to below Long Lake, exceeded EPA criteria for protecting aquatic life. Zinc generally exceeded the acute criterion by a facto of 2, and lead exceeded the chronic criterion by factors of 3 to 6."[5] In fact, Ecology even completed a TMDL for dissolved metals in the Spokane River.[6] Given all of this, it is unimaginable how Ecology could exempt the Spokane River from metals requirements.

Further, it is unclear whether Ecology intends to exempt the Spokane River from flow control requirements described on pages 14-15. Inflow of sediments and phosphorous is of critical concern in the Spokane River. Nonpoint sources from the river's tributaries and urban runoff contributes to high levels of phosphorous and the resulting low levels of dissolved oxygen in Long Lake (which is §303(d) listed for dissolved oxygen).

Lastly, the Spokane River is water quality impaired for dissolved oxygen due in large part to point and nonpoint phosphorous discharges.[7] Accordingly, specific phosphorous treatment requirements, as described on page 12, must be developed to prevent additional contributions of phosphorous into the river.

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[4] Available at http://www.ecy.wa.gov/pubs/99330.pdf.
[5] The document is available at http://www.ecy.wa.gov/pubs/97e02.pdf.
[6] Available at http://www.ecy.wa.gov/pubs/9949.pdf.
[7] *See* Draft Dissolved Oxygen TMDL at http://www.ecy.wa.gov/programs/wq/tmdl/watershed/spokaneriver/dissolved_oxygen/spokane_revised_do_draft_tmdl_submittal-101504.pdf.

Appendix 2: See comments on TMDLs above.

Thank you for the opportunity to comment on the draft permit. We look forward to working with Ecology throughout the finalization process for the permit.

Sincerely,

/s/

Rick Eichstaedt
on behalf of Sierra Club,
Upper Columbia River Group